

CICC Background Paper on the Crime of Aggression

ASP 5, Resumed Session, 29 Jan – 1 Feb 2007

Outlook for the Resumed Fifth Session of the ASP

1. At the resumed fifth session of the ASP, the **Special Working Group on the Crime of Aggression (SWGCA)** will hear reactions to the new Discussion Paper proposed by the Chairman and build further on the deliberations of the Princeton inter-sessional meeting in June 2006. The SWGCA will also continue to be guided by the Discussion Papers of the three sub-coordinators mentioned below.
2. Progress is most likely on the definition of the **conduct element in the crime of aggression**. The choice between the **'monistic' and 'differentiated' approach** described below may become clearer, especially if the SWGCA moves ahead in the decision about a conduct verb[s] for the **'differentiated' approach**. The new Discussion Paper of the Chairman may move the definition of the act of aggression closer towards agreement, especially with the reference to Articles 1 and 3 of General Assembly Resolution 3314.
3. The discussions on the **jurisdictional conditions** for the crime of aggression may profit from a proposal offered by Belgium at the regular ASP session in 2006. The proposal has the objective to filter out politicized recourse to the Court. In the case of State referrals and proceedings initiated by the Prosecutor, an expanded Pre-Trial Chamber of nine Judges would make a preliminary decision. With the opportunity to appeal this decision, fourteen Judges would be engaged in this pre-trial safeguard. The filter is intended to be purely judicial.
4. The **new 2007 Discussion Paper** does not contain any changes to the Elements of Crimes in Section II because they have not been discussed since 2002. The SWGCA might debate this if it is time for a fresh look at Section II.

History

5. While **Article 5(1) of the Rome Statute** lists the crime of aggression as one of the crimes under the jurisdiction of the Court, the Court cannot yet exercise jurisdiction over this crime because the Rome Diplomatic Conference did not reach an agreement on a definition and jurisdictional conditions. Consequently, **Resolution F of the Final Act of the Rome Conference** requested that the subsequent Preparatory Commission prepare proposals for a provision on aggression to be presented to the Assembly of States Parties for consideration at the first Review Conference. The provision on aggression shall enter into force in accordance with the relevant provisions of Articles 5(2), 121 and 123 of the Rome Statute.
6. The Preparatory Commission concluded its work in the form of a **Coordinator's Discussion Paper**.¹ At its first session in September 2002, the ASP adopted a resolution which established a **Special Working Group on the Crime of Aggression (SWGCA)** to continue the work on a provision on aggression and to meet during ASP sessions or at any other time that the Assembly deems appropriate and feasible.

¹ PCNICC/2002/2/Add.2

CICC Background Paper on the Crime of Aggression

ASP 5, Resumed Session, 29 Jan – 1 Feb 2007

7. The ASP Bureau appointed **Ambassador Christian Wenaweser of Liechtenstein** to chair the Special Working Group. The SWGCA is open to all States on an equal basis, and both States Parties and non-States Parties participate in the meetings. The Special Working Group has met during the second, third, fourth and fifth ASP sessions in September 2003/2004, November/December 2005 and November/December 2006 and three times in inter-sessional meetings in June 2004, 2005 and 2006 at Princeton University.
8. The **2002 Coordinator's Discussion Paper** has served as basis for the deliberations until now. Since 2005, the work has been further structured with the help of three additional Discussion Papers produced by three sub-coordinators (ICC-ASP/4/32, Annex II. B, C, and D). At the fifth ASP in The Hague last year, delegations stated that the time had come to update the 2002 Coordinator's paper. Reflecting the progress achieved since 2002, a **new Discussion Paper** produced by the Chair of the Special Working Group (ICC-ASP/5/SWGCA/2), will serve as basis for the negotiations starting with the resumed session of ASP 5.
9. Just like the 2002 Discussion Paper, the new paper covers the draft provision for the **crime of aggression in section I and the Elements of Crime in section II**. It also indicates where amendments might have to be made to other parts of the Statute in order to allow for a smooth incorporation of the provisions on the crime of aggression into the Statute. The revised paper is more streamlined, yet it continues to include a variety of views, with lists of options, the inclusion of variants, and alternatives in square brackets and footnotes.

Substantive Issues

10. As reflected particularly well at Princeton 2006, the primary substantive issues before the SWGCA can be roughly divided into **three 'baskets'**:
 - **the crime of aggression (defining the individual's conduct)**, which includes the relationship with the General Principles of Part 3 of the Rome Statute;
 - **the definition of the act of aggression (defining the act of State); and**
 - **the conditions for the exercise of jurisdiction.**

The Crime of Aggression – Defining the Individual's Conduct

11. The definition of the **crime of aggression** includes three elements: **the leadership clause, the conduct, and the State act of aggression**. Since the State act has been addressed in a separate 'basket', the discussions with regard to the individual crime have focused primarily on the leadership clause and the conduct element.
12. While there have been some efforts to reconsider the **leadership clause**, the SWGCA has been largely in agreement that the existing leadership clause in the 2002 Coordinator's Discussion Paper should not be reopened. The clause has been maintained in the 2007 Discussion Paper of the Chairman.

CICC Background Paper on the Crime of Aggression

ASP 5, Resumed Session, 29 Jan – 1 Feb 2007

13. With regard to the **conduct element**, the SWGCA is deciding between the **‘monistic’ and a ‘differentiated’ approach**. The ‘monistic’ approach was taken in the 2002 Discussion Paper whereas the 2007 Discussion Paper lists both approaches.
14. The **‘monistic’** approach uses the **conduct verbs “orders or participates”**. Since these words are considered to already include all forms of commission and participation, Article 25 para.3 (a)-(f) of the Rome Statute (on individual criminal responsibility) is not applicable.
15. Under the **‘differentiated’** approach, the **conduct element focuses on the principal perpetrator**, i.e. the verb captures the aggression-specific character of the conduct. Other forms of participation are addressed by Article 25 para. 3(a)-(d) of the Statute. The crime of aggression is treated in this regard like the other crimes under the jurisdiction of the Court but a leadership clause may also be attached to Article 25 para. 3(a)-(d) in order to confirm that non-leaders such as ordinary soldiers should not be prosecuted.
16. In Princeton 2006, **support has been stronger for the ‘differentiated’ approach** but it was also agreed that the monistic approach still needed to be retained since the SWGCA has not yet agreed on the conduct verb which would be most fitting with the ‘differentiated’ approach.
17. In the context of the definition of the individual crime, the SWGCA has also evaluated other General Principles of the Statute. As reflected in the 2007 Discussion Paper, the definition relies for the requirements of **intent and knowledge** on the default rules of the Statute. The non-applicability of Article 33 provided for in the 2002 Discussion Paper has now been deleted. The non-applicability of Article 28 is still included. Article 25 para. 3(f) is inapplicable because its wording does not fit with the definition and jurisdictional conditions of aggression.

The Act of Aggression – Defining the Act of State

18. For the **act of aggression**, the SWGCA has debated whether the definition should be **generic or specific**. A **generic definition does not include a list of acts of aggression while a specific definition is accompanied by such a list**, e.g. the one contained in Article 3 of United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974. In Princeton 2006, the SWGCA has favored the combination of a generic chapeau with an exhaustive list of specific acts.
19. The 2006 Princeton meeting discussed also how to describe the aggression by a State, namely whether to use the words **“use of force,” “armed attack,” “act of aggression” or “use of armed force”** which refer to the **quality of the act as opposed to the intensity of the act**. Many participants preferred to retain the term “act of aggression” to link the collective act of the State to the crime committed by the individual.

CICC Background Paper on the Crime of Aggression

ASP 5, Resumed Session, 29 Jan – 1 Feb 2007

20. The SWGCA has repeatedly evaluated the phrase “**which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations**” in Paragraph 1 of the 2002 Discussion Paper. Some States have stressed that there was no need for an **additional qualifier** of the term “violation of the Charter”. The point has been made that a threshold is inherent in the limitation of the jurisdiction of the Court under Article 1 of the Statute, i.e. the “most serious crimes of international concern”. Other States continue to support the retention of the phrase in order to exclude borderline and unclear cases. The term ‘**manifest**’ has been preferred over the term ‘**flagrant**’ if a qualifier is to be retained.
21. In Princeton 2006, most States have been opposed to the idea that the act has to amount to a “**war of aggression**”. There was a predominant view that the inclusion of this reference would be too restrictive. But the opinion was also expressed that the reference to “war of aggression” should not yet be abandoned.
22. The relevance of the **object or result of an act of aggression** constitutes another substantive issue. Most prefer not to require a particular object or result for the act. Reasons have included that the proposed object would extend into *ius in bello*, whereas the crime of aggression would fall within *ius ad bellum*; an exhaustive enumeration of the objects or results would be difficult; and military occupation or annexation present only two but not all of the examples of aggression under General Assembly Resolution 3314.
23. Three main options have been discussed with regard to a reference to **General Assembly Resolution 3314 (XXIX) for the definition of the act**: a general reference to Resolution 3314 as a whole; a reference only to specific parts of Resolution 3314, specifically Articles 1 and 3; or a reproduction of parts of the text of the Resolution.
24. In line with the **principle of legality**, States have widely recognized that the *definition* should not be dependent on a post-crime determination, such as a ‘prior’ (pre-trial) but post-crime determination by the Security Council. The definition or meaning of the crime must be clear in all its elements, including the element of the State act of aggression, before the crime is committed. This *definitional* issue must be differentiated from the *jurisdictional* issue, i.e. if the Court’s exercise of jurisdiction should be dependent on a (post-crime/pre-trial) prior determination by another institution (see below). The *definitional* issue must be also differentiated from the *due process* issue, i.e. if the Court’s *determination* of the act of aggression should be dependent on the prior determination of another body (see below).
25. The SWGCA has evaluated the possibility and necessity for including the **attempt of an act of aggression by a State**. This question should not be mixed up with the question if attempt of the *individual* crime under Art.25 para.3 (f) should be included (see above). The inter-sessional meeting in Princeton 2006 came to the conclusion that the essence of the definition of the act already covered the scenarios pondered in the context of the evaluation of attempt by a State.

CICC Background Paper on the Crime of Aggression

ASP 5, Resumed Session, 29 Jan – 1 Feb 2007

Conditions for the exercise of jurisdiction

26. The SWGCA is debating whether the Court's **exercise of jurisdiction over the individual crime of aggression should be conditioned on a prior determination of the State/collective act of aggression**, be it by the Security Council or another outside body. Some States are of the opinion that Article 39 of the UN Charter does not give exclusive authority to the Security Council for the determination of an act of aggression and does not require a prior determination by the Security Council before the Court can exercise its jurisdiction. States feel nevertheless that it would be wise to require a prior determination in order to preclude the politicization of the Court. Some of this group would rely on the Security Council, some look to the General Assembly or the International Court of Justice, while others ponder additional procedural safeguards within the Court. Still another group remains unconvinced that any prior determination or other safeguard is needed.
27. States have weighed if any requirement of additional jurisdictional conditions should depend on the trigger mechanism used. In this context, the SWGCA has debated in particular if the **referral of situations by the Security Council** should require an additional determination of the act of aggression by the Council, or possibly by another institution. States kept in mind three types of decisions by the Security Council. It could: a) determine that an act of aggression had occurred and refer the situation to the Court in accordance with Article 13(b) of the Statute; b) determine that an act of aggression had occurred without making a referral; c) refer a situation to the Court without making a determination of an act of aggression.
28. The SWGCA has also considered the **due process implications of a prior determination of the act of aggression by another institution**. There has been wide agreement that the rights of the accused must be respected, that a prior determination cannot be binding on the Court on substance. In this context it was pointed out in particular that the Court must be able to examine the element of the State act under the definition and threshold of the Statute, and that the burden of proof cannot be shifted to the accused.

Timetable: The 'Roadmap'

29. In the fourth session of the Assembly of States Parties (ASP), it had been decided that **from 2006 to 2008 the Special Working Group should be allocated at least 10 days of meetings** in New York during resumed sessions and hold inter-sessional meetings as appropriate. In addition, the ASP reiterated that the 2007 resumed session in New York would have not less than three days (now four days) for the Special Working Group.
30. As it had already done at the fourth session in 2005, the Assembly in 2006 again recognized that the Special Working Group needs to conclude its work at the latest 12 months prior to the Review Conference to be held in accordance with Article 123(1) of the Statute in order to be in a position to submit proposals for a provision on aggression, in accordance with Article 5(2) and with Resolution ICC-ASP/1/Res.1 (paragraph 37 of the 2006 Omnibus Resolution).

CICC Background Paper on the Crime of Aggression

ASP 5, Resumed Session, 29 Jan – 1 Feb 2007

31. Given that the Rome Statute provides for the **Review Conference** to be convened in 2009, the Special Working Group had already in 2005 decided to conclude its work in 2008. During the fifth session of the ASP, the Special Working Group was alerted to the possibility that the Review Conference might be held in 2010. Support was expressed for the existing timetable. At the same time, a possible extension of the work of the SWGCA beyond 2008 was advocated if the Review Conference were to be held in 2010.

Relevant documents

Discussion paper proposed by the Chairman, ICC-ASP/5/SWGCA/2, 16 January 2006,
http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-2_English.pdf

Report of the Special Working Group on the Crime of Aggression, ICC-ASP/5/SWGCA/1, 29 November 2006, http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-1_English.pdf

Informal Inter-sessional Meeting of the Special Working Group on the Crime of Aggression, ICC-ASP/5/SWGCA/INF.1, 5 September 2006,
http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-INF1_English.pdf

Report of the CICC Team on the Crime of Aggression on the 2006 Inter-sessional meeting, August 2006,
http://www.iccnw.org/documents/TeamReportOnIntersessionalMeeting_26Aug06.pdf

Discussion Paper 1, The Crime of Aggression and Article 25, paragraph 3, of the Statute, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.B, <http://www.icc-cpi.int/library/asp/Annexes.pdf>

Discussion Paper 2, The conditions for the exercise of jurisdiction with respect to the crime of aggression, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.C, <http://www.icc-cpi.int/library/asp/Annexes.pdf>

Discussion Paper 3, Definition of Aggression in the Context of the Statute of the ICC, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.D, <http://www.icc-cpi.int/library/asp/Annexes.pdf>

Discussion paper on the definition and elements of the crime of aggression prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the International Criminal Court, PCNICC/2002/2/Add.2, *also in* Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Second Session, New York, 8-12 September 2003, ICC-ASP/2/10, Annex II,
http://www.un.org/law/icc/asp/2ndsession/report/english/annex_ii_e.pdf